Cons. Nos. 14-556, 14-562, 14-571, 14-574

In the
Supreme Court of the United States

James Obergefell, *et al.*, *Petitioners*, vs.
Richard Hodges, *et al.*, *Respondents*

Valeria Tanco, *et al.*, *Petitioners*, vs.
William Haslam, Governor of Tennessee, *et al.*,
Respondents

April DeBoer, *et al.*, *Petitioners*, vs.
Richard Snyder, Governor of Michigan, *et al.*,
Respondents

Gregory Bourke, *et al.*, *Petitioners*, vs.
Steve Beshear, Governor of Kentucky, *et al.*,
Respondents

On Writs of *Certiorari* to the United States
Court of Appeals for the Sixth Circuit

Brief *Amicus Curiae* of the Family Research Council in Support of Respondents and Affirmance

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

INTEREST OF *AMICUS CURIAE*. 1

SUMMARY OF ARGUMENT. 2

ARGUMENT:

I. THE RESERVATION OF MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT INTERFERE WITH THE FUNDAMENTAL RIGHT TO MARRY PROTECTED BY THE DUE PROCESS CLAUSE. 7

II. THE RESERVATION OF MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT DISCRIMINATE ON THE BASIS OF SEX IN VIOLATION OF THE EQUAL PROTECTION CLAUSE 20

III. THE RESERVATION OF MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.. 26

CONCLUSION. 31

Appendix

Partial List Of Same-Sex Marriage Cases In Which One Or More Of The Plaintiffs Acknowledged That They Had Previously Been Married To A Person Of The Opposite Sex. 1a

TABLE OF AUTHORITIES

Cases:

Andersen v. King County, 138 P.3d 963 (Wash. 2006). 21, 27

Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). 5, 23, 27

Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972). 21

Baker v. State, 744 A.2d 864 (Vt. 1999). 21-22, 27

Baskin v. Bogan, 12 F.Supp.3d 1144 (S.D. Ind. 2014), *aff'd*, 766 F.3d 648 (7th Cir. 2014). 22

Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014). 28

Bishop v. United States ex rel. Holder, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *aff'd sub nom. Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014). 22

Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014). 30

Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014). 17

Bowers v. Hardwick, 478 U.S. 186 (1986). 4, 5

Bronson v. Swensen, 395 F. Supp. 2d 1329 (D. Utah 2005), *aff'd in part and vacated in part and remanded with directions*, 500 F.3d 1099 (10th Cir. 2007).. 15

Brown v. Board of Education, 347 U.S. 483 (1954). 24

Butler v. Wilson, 415 U.S. 953 (1974). 11

Carey v. Population Services Int'l, 431 U.S. 678 (1977).. 16

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).. 30

Collins v. City of Harker Heights, Texas, 503 U.S. 115 (1992).. 8

Conaway v. Deane, 932 A.2d 571 (Md. 2010). . . . . *passim*

Conde-Vidal v. Garcia-Padilla, Civil No. 14-1253 (PG) (D. P.R.), Oct. 21, 2014, *appeal pending*, Case No. 14-2184 (1st Cir.). 18

Craig v. Boren, 429 U.S. 190 (1976).. 24

Dean v. District of Columbia, 653 A.2d 307 (D.C. Ct. App. 1995). 21, 27

District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52 (2009). 8, 12

Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981). 5

Ex parte State of Alabama ex rel. Alabama Policy Institute, No. 1140460, Alabama Supreme Court, March 3, 2015. 21

Force by Force v. Pierce City R-VI School District, 570 F. Supp. 1020 (W.D. Mo. 1983). 24

Frontiero v. Richardson, 411 U.S. 677 (1973). 24

Geiger v. Kitzhaber, 994 F.Supp.2d 1128 (D. Or. 2014). 22

Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (Mass. 2003). . . . . *passim*

Griego v. Oliver, 316 P.3d 865 (N.M. 2013). 21, 28

Griswold v. Connecticut, 381 U.S. 479 (1965). 16

Hamalainen v. Finland, No. 37359/09, ECHR 2014 (Grand Chamber) (July 16, 2014). 5

Hernandez v. Robles, 805 N.Y.S.2d 354 (App. Div. 2005), *aff'd*, 855 N.E.2d 1 (N.Y. 2006). 22, 25

Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006). 9, 21, 27

Hollingsworth v. Perry, 133 S.Ct. 2652 (2013). 19

In re Kane, 808 N.Y.S.2d 566 (N.Y. App. Div. 2006), *aff'd* 855 N.E.2d 1 (N.Y. 2006). 22

In re Marriage Cases, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *rev'd on other grounds*, 183 P.3d 384 (Cal. 2008).. 22

In re Marriage Cases, 183 P.3d 384 (Cal. 2008).. . . . . 21, 28

In re Parentage of L.B., 89 P.3d 271 (Wash. Ct. App. 2004), *aff'd in part, rev'd in part on other grounds*, 122 P.3d 161 (Wash. 2005). 27

Jackson v. Abercrombie, 884 F. Supp. 2d 1065 (D. Haw. 2012), *vacated and remanded with directions to dismiss on grounds of mootness*, 585 Fed. App'x 413 (9th Cir. 2014). 22

Jernigan v. Crane, Case No. 4:13-cv-00410 KGB (E.D. Ark.), Opinion and Order, Nov. 25, 2014, *appeal pending*, No. 15-1022 (8th Cir.).. 22

Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973).. 21

Kerrigan v. Comm'r of Public Health, 957 A.2d 407 (Conn. 2008). 28

Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014). 22

Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014). . . 18-19

Latta v. Otter, 19 F. Supp. 3d 1054 (D. Idaho 2014), *aff'd*, 771 F.3d 456 (9th Cir. 2014), *petitions for certiorari pending*, Nos. 14-765, 14-788. 22

Latta v. Otter, 771 F.3d 456 (9th Cir. 2014), *petitions for certiorari pending*, Nos. 14-765, 14-788... 23, 28, 29

Lawrence v. Texas, 539 U.S. 558 (2003).. ..... *passim*

Lawson v. Kelly, Case No. 14-0622-CV-W-ODS (W.D. Mo.), Opinion and Order, Nov. 7, 2014, *appeals pending*, Nos. 14-3779, 3780 (8th Cir.)... 22

Lewis v. Harris, 875 A.2d 259 (N.J. Super Ct. App. Div. 2005), *aff'd in part and modified in part*, 908 A.2d 196 (N.J. 2006)..... 18

Louisiana High School Athletic Ass'n v. St. Augustine High School, 396 F.2d 224 (5th Cir. 1968)..... 26

Loving v. Virginia, 388 U.S. 1 (1967)..... *passim*

Maynard v. Hill, 125 U.S. 190 (1888)..... 10-11

McLaughlin v. Florida, 379 U.S. 184 (1964). 24

Meyer v. Nebraska, 262 U.S. 390 (1923).. 10

Mississippi University for Women v. Hogan, 458 U.S. 718, 719 (1982)..... 24

Moe v. Dinkins, 533 F. Supp. 623 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir. 1982) (*per curiam*)..... 16, 17

Morrison v. Sadler, Cause No. 49D13-0211-PL-00196, Order on Motion to Dismiss (May 7, 2003), *aff'd*, 821 N.E.2d 15 (Ind. Ct. App. 2005). 18

Muth v. Frank, 412 F.3d 808 (7th Cir. 2005)..... 16

Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded with instructions to dismiss appeal for lack of standing sub nom. Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013)..... 22, 28

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979)..... 29

Planned Parenthood v. Casey, 505 U.S. 833 (1992)..... 13

Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985)..... 15-16

Reed v. Reed, 404 U.S. 71 (1971)..... 24

Reno v. Flores, 507 U.S. 292 (1993)..... 8

Robicheaux v. Caldwell, 2 F. Supp. 3d 910 (E.D. La. 2014), *appeal pending*, No. 14-31037 (5th Cir.)... 17, 19, 22

Roe v. Wade, 410 U.S. 113 (1973)..... 16

Romer v. Evans, 517 U.S. 620 (1996)..... 30

Samuels v. New York State Dep't of Health, 811 N.Y.S.2d 136 (App. Div. 2006), *aff'd*, 855 N.E.2d 1 (N.Y. 2006)..... 9, 22

Schalk & Kopf v. Austria, No. 30141/04, ECHR 2010 (First Section) (June 24, 2010)..... 5

Sevcik v. Sandoval, 911 F. Supp. 2d 997 (D. Nev. 2012), *rev'd*, 771 F.3d 456 (9th Cir. 2014). 22, 27

Seymour v. Holcomb, 811 N.Y.S.2d 134 (N.Y. App. Div. 2006), *aff'd* 855 N.E.2d 1 (N.Y. 2006). 22

Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).. . . 21

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).. . . . . 3, 10, 16

Smelt v. County of Orange, 374 F. Supp.2d 861 (C.D. Cal. 2005), *aff'd in part, vacated in part and remanded with directions to dismiss for lack of standing*, 447 F.3d 673 (9th Cir. 2006). 24, 27

Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003). 10

State v. Holm, 2006 UT 31, 137 P.3d 726.. 15

State v. Allen M., 571 N.W.2d 872 (Wis. Ct. App. 1997). 16

Turner v. Safley, 482 U.S. 78 (1987).. . . . . 10, 11, 12, 14

United States v. Virginia, 518 U.S. 515 (1996).. 24

United States v. Windsor, 133 S.Ct. 2675 (2013).. . . *passim*

Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).. 28

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). 29

Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd mem. by an equally divided Court*, 430 U.S. 703 (1977). 24

Washington v. Davis, 426 U.S. 229 (1976). 29

Washington v. Glucksberg, 521 U.S. 702 (1997). 3, 8

Waters v. Ricketts, Case No. 8:14CV536 (D. Neb.), Memorandum and Order, March 2, 2015, *appeal pending*, No. 15-1452 (8th Cir.). 22

Wightman v. Wightman, 4 Johns. Ch. 343 (1820). 15

Zablocki v. Redhail, 434 U.S. 374 (1978). 10, 14, 16

Statutes:

U.S. Const. amend. XIV. . . . . *passim*

Defense of Marriage Act, § 3, 1 U.S.C. § 7 (2008). 4, 6

Ky. Const. § 233A. 2

Mich. Const. art. I, § 25. 2

Ohio Const. art. 15, § 11. 2

Tenn. Const. art. XI, § 18. 2

Other Authorities:

118 Cong. Rec. 9331 (1972). 26

David H. Fowler, Northern Attitudes Towards Interracial Marriage (1987).. 13

Andrew Koppelman, *Response: Sexual Disorientation*, 100 Geo. L.J. 1083 (2012).. 28

Irving G. Tragen, *Statutory Prohibitions against Interracial Marriage*, 32 Cal. L. Rev. 269 (1944).. 13

Lynn Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 How. L. Rev. 117 (2007).. 13

Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U.L. Rev. 275 (1985).. 14

Hollingsworth v. Perry, 133 S.Ct. 2652 (2013), tr. of oral argument (March 26, 2013) 19

INTEREST OF *AMICUS CURIAE*[*]

The Family Research Council (FRC) was founded in 1983 as an organization dedicated to the promotion of marriage and family and the sanctity of human life in national policy. Through publications, media appearances, public events, debates and testimony, FRC's team of policy experts reviews data and analyzes Congressional and executive branch proposals that affect the family. FRC also strives to assure that the unique attributes of the family are recognized and respected in the decisions of courts and regulatory bodies.

FRC champions marriage and family as the foundation of civilization, the source of virtue and the wellspring of society. Believing that God is the author of life, liberty and the family, FRC promotes the Judeo-Christian world view as the basis for a just, free and stable society. Consistent with its mission statement, FRC is committed to strengthening traditional families.

Having publicly supported the efforts to adopt the constitutional amendments challenged here, FRC has a particular interest in the outcome of these cases. In FRC's judgment, the legalization of same-sex marriage, through legislation or litigation, inevitably would be detrimental to the institution of marriage, children and society as a whole. And for the reasons set forth herein, nothing in the Constitution, properly understood, requires the States to license or recognize such marriages. Thus, the judgment of the court of appeals should be affirmed.

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[*] Letters of consent have been filed with the Clerk. None of the counsel for the parties authored this brief in whole or in part, and no one other than *amicus* or its counsel has contributed money or services to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

On November 2, 2004, the People of the States of Kentucky, Michigan and Ohio overwhelmingly approved amendments to their state constitutions reserving marriage to opposite-sex couples and denying recognition to all other marriages, wherever performed. Ky. Const. § 233A, Mich. Const. art. I, § 25, Ohio Const. art. 15, § 11. Two years later, on November 7, 2006, the People of Tennessee, by an even greater margin, approved a similar amendment to their state constitution. Tenn. Const. art. XI, § 18. In all four States, the amendments codified both recent and longstanding statutes reserving marriage to opposite-sex couples, *see* Op. 9-13 (tracing history of laws back to the late eighteenth and early nineteenth centuries), which, in turn, confirmed the common law understanding of marriage as a relationship that can exist only between a man and a woman.

Petitioners in these consolidated cases challenged the amendments and related statutes alleging, ***inter alia***, that the laws impermissibly interfere with the fundamental right to marry protected by the Due Process Clause and also discriminate on the basis of sex and sexual orientation in violation of the Equal Protection Clause. In each case, the district court struck down the amendment and related statutes. In a divided opinion, the court of appeals reversed the district courts and upheld the laws. On January 16, 2015, this Court granted certiorari to review the judgment of the court of appeals.

1. Petitioners' substantive due process analysis is deeply flawed. The fundamental constitutional right to marry that has been recognized by this Court has always

been understood to be limited, by the nature of marriage itself, to opposite-sex couples who, *as a class*, are capable of procreating children. *See, e.g., Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("[m]arriage and procreation are fundamental to the very existence and survival of the race"). Although marriage serves a variety of purposes, it is a privileged legal and social institution primarily to channel the potential procreative sexual activity of opposite-sex couples into stable relationships in which the children so procreated may be raised by their biological mothers and fathers.[1] Unlike the sexual activity of opposite-sex couples, the sexual activity of same-sex couples can never result in the procreation of children. Given the nature of marriage as it has been understood since colonial days, no right to same-sex marriage can be derived from "the Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

In arguing that same-sex couples enjoy the same fundamental right to marry as opposite-sex couples, petitioners rely principally on this Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S.Ct. 2675 (2013). *See* Ky. Pet. Br. 2-3, 5, 7, 14-15, 17-24, Mich. Pet. Br. 22, 24, 26, 28, 57-60, 63, Ohio Pet. Br. 4, 18-32, Tenn. Pet. Br. 14, 17, 20-23. But

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[1] "Civil marriage is the product of society's critical need to manage procreation as the inevitable consequence of intercourse between members of the opposite sex. Procreation has always been at the root of marriage and the reasons for its existence as a social institution. Its structure, one man and one woman committed for life, reflects society's judgment as how optimally to manage procreation and the resultant child rearing." *Goodridge v. Dep't of Health*, 798 N.E.2d 941, 1002 n. 34 (Mass. 2003) (Cordy, J., dissenting).

neither case supports their argument.

First, the ***holdings*** in *Lawrence* and *Windsor* are not controlling on the precise issue presented here–whether same-sex couples have a fundamental right to marry. In *Lawrence*, which struck down a Texas statute criminalizing private, non-commercial sexual activity between consenting adults, the Court expressly stated that its decision "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578. In *Windsor*, which struck down § 3 of the federal Defense of Marriage Act, 1 U.S.C. § 7 (2008), the Court emphasized that "This opinion and its holding are confined to those lawful marriages," 133 S.Ct. at 2696, referring to same-sex marriages that a State has chosen to recognize. In other words, neither the holding nor the opinion has any application outside the issue presented therein.

Second, the ***reasoning*** in *Lawrence* and *Windsor* does not support petitioners, either. In overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court in *Lawrence* observed that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter[;]" that "[l]aws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private[;]" that "American laws targeting same-sex couples did not develop until the last third of the 20th century[;]" that "our laws and traditions in the past half century are of most relevance here[;]"[2] and that, almost

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[2] Focusing on the dwindling number of States that prohibited sodomy and the even fewer States that enforced their sodomy laws against private consensual conduct.

five years before *Bowers* was decided, the European Court of Human Rights had struck down a Northern Ireland law prohibiting "consensual homosexual conduct." *Lawrence*, 539 U.S. at 568, 569, 570, 571-72, 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981)). These observations were critical to its holding striking down the Texas sodomy statute.

By way of contrast, there *has* been a "longstanding history in this country of laws" reserving marriage to opposite-sex couples; the laws forbidding same-sex marriages *have* been consistently enforced (by the denial of marriage licenses to same-sex couples who have applied for them); the prohibition of same-sex marriage *is* an unbroken continuum from the common law, to state statutes and, in the majority of States, to state constitutional amendments; before the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Dep't of Health*, 798 N.E.2d 941 (Mass. 2003), twelve years ago, *no* State had allowed same-sex marriage, and since the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *three times as many States* have codified their traditional prohibition of same-sex marriage in their statutes and/or constitutions as have allowed such marriages (in the absence of a court order); and, finally, the European Court of Human Rights has recently reaffirmed its earlier judgment holding that the European Charter does *not* require Contracting States "to grant same-sex couples access to marriage." *Hamalainen v. Finland*, No. 37359/09, ¶ 71, ECHR 2014 (Grand Chamber) (July 16, 2014), reaffirming *Schalk and Kopf v. Austria*, No. 30141/ 04, ¶ 101, ECHR 2010 (First Section) (June 24, 2010). The analysis in *Lawrence* is not controlling on the question presented here.

In *Windsor*, the Court, stressing the unusual nature of the federal government's wholesale intrusion into a matter of traditional state concern, 133 S.Ct. at 2689-92, held that § 3 of DOMA violated the Fifth Amendment because it "singles out a class of persons deemed *by a State* entitled to recognition and protection to enhance their own liberty" and "imposes a disability on the class by refusing to acknowledge a status *the State* finds to be dignified and proper." *Id.* at 2695-96 (emphasis added). The focus of the Court's analysis was the federal government's devaluation of same-sex marriages that a *State* had chosen to recognize. Nothing in *Windsor* dictates or even suggests the appropriate resolution of the present cases. Indeed, the Court recognized that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations . . . ." *Id.* at 2691 (citation and internal quotation marks omitted). Reserving marriage to opposite-sex couples does not violate the fundamental right to marry protected by the Due Process Clause.

2. Nor do the challenged amendments and statutes deny the equal protection of the laws on the basis of sex in violation of the Equal Protection Clause. The classification in the laws is not between men and women, but between opposite-sex couples and same-sex couples of either sex. The amendments and statutes treat men and women equally: both may marry someone of the opposite sex; neither may marry someone of the same sex. There is no discrimination between men and women.

3. Finally, the challenged amendments and statutes do not discriminate on the basis of sexual orientation. The laws are neutral on their face with

respect to a person's sexual orientation. And the fact that they may have a disparate impact on homosexuals is of no constitutional relevance in the absence of competent evidence (which is lacking here) that they were adopted and enacted with the *intent* or *purpose* of discriminating against homosexuals, as opposed to the mere *knowledge* that the laws could have such an impact. There is no discrimination on the basis of sexual orientation.

ARGUMENT

I.

THE RESERVATION OF MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT INTERFERE WITH THE FUNDAMENTAL RIGHT TO MARRY PROTECTED BY THE DUE PROCESS CLAUSE.

Petitioners contend that the fundamental right to marry protected by the Due Process Clause includes the right to marry someone of the same sex. *See* Ky. Pet. Br. 18-23, Mich. Pet. Br. 56-64, Tenn. Pet. Br. 18-21. The court of appeals rejected this contention, Op. 28-31, and properly so. Petitioners' fundamental rights analysis cannot be reconciled with the Court's precedents or with the nature of marriage as a protected social and legal institution.

In determining whether an asserted liberty interest (or right) should be regarded as fundamental for purposes of substantive due process analysis under the Due Process Clause of the Fourteenth Amendment (infringement of which would call for strict scrutiny review), this Court

applies a two-prong test. First, there must be a "careful description" of the asserted fundamental liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citation and internal quotation marks omitted).[3] Second, the interest, so described, must be "deeply rooted" in "the Nation's history, legal traditions, and practices." *Id.* at 710, 721.

In *Glucksberg*, the Court characterized the asserted liberty interest as "a right to commit suicide which itself includes a right to assistance in doing so," not whether there is "a liberty interest in determining the time and manner of one's death," "a right to die," "a liberty to choose how to die," "[a] right to choose a humane, dignified death" or "[a] liberty to shape death." *Id.* at 722-23 (citations and internal quotation marks omitted).

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[3] *Glucksberg* was not an anomaly in demanding precision in defining the nature of the interest (or right) being asserted. *See, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993) (describing alleged right as "the . . . right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than that of a government-operated or government-selected child-care institution," not whether there is a right to "freedom from physical restraint," "a right to come and go at will" or "the right of a child to be released from all other custody into the custody of its parents, legal guardians, or even close relatives"); *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125-26 (1992) (describing asserted interest as a government employer's duty "to provide its employees with a safe working environment"). *See also District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 72-73 (2009) (convicted felon has no freestanding "substantive due process right" to obtain the State's DNA evidence in order to apply new DNA-testing technology that was not available at the time of his trial) (relying upon *Glucksberg*, *Reno* and *Collins*).

For purposes of substantive due process analysis, the issue in these cases is not *who* may marry, but "*what* marriage is." *Windsor*, 133 S.Ct. at 2716 (Alito, J., dissenting) (emphasis added). The principal defining characteristic of marriage as it has been understood throughout Western Civilization is the union of a man and a woman.[4] As the New York Court of Appeals observed, "The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who every lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006). *See also Windsor*, 133 S.Ct. at 2689 ("until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage"), *id.*, ("[t]he limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental"). Properly framed, therefore, the issue before this Court is not whether there is a fundamental right to enter into a marriage with the person of one's choice, but whether there is a right to enter into a same-sex marriage.

The Court has recognized a substantive due process right to marry. *Loving v. Virginia*, 388 U.S. 1

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[4] "To remove from 'marriage' a definitional component of that institution (i.e., one woman, one man) which long predates the constitutions of this country and state. . . would, to a certain extent, extract some of the deep roots that support its elevation to a fundamental right." *Samuels v. New York State Dep't of Health*, 811 N.Y.S.2d 136, 141 (App. Div. 2006) (citation and internal quotation marks omitted), *aff'd*, 855 N.E.2d 1 (N.Y. 2006).

(1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987). But the right recognized in these decisions all concerned *opposite*-sex, not *same*-sex, couples. *Loving*, 388 U.S. at 12, *Zablocki*, 434 U.S. at 384, *Turner*, 482 U.S. at 94-97. That the right to marry is limited to opposite-sex couples is clearly implied in a series of cases relating marriage to procreation and childrearing.[5] *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("[m]arriage and procreation are fundamental to the very existence and survival of the race"); *Loving*, 388 U.S. at 12 (same); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty language in Due Process Clause includes "the right of the individual . . . to marry, establish a home and bring up children"); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (referring to marriage as "the foundation of the family and of society, without which there would be neither civilization nor

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[5] Contrary to the understanding of the petitioners, *see* Ky. Pet. Br. 47, Mich. Pet. Br. 62-65, Ohio Pet. Br. 55-58, Tenn. Pet. Br. 18, the linkage of the right to marry to procreation is not undermined by the fact that married persons have a right to choose not to reproduce. After all, "[t]he ability to bear or beget children is inherently a characteristic requiring at some level the participation of a man and a woman . . . ." *Conaway v. Deane*, 932 A.2d 571, 621-22 n.64 (Md. 2007). Moreover, only the sexual activity of opposite-sex couples is capable of producing children; by definition, the sexual activity of same-sex couples cannot. Accordingly, it is only the potential procreative sexual activity of opposite-sex couples that needs to be channeled into a stable social and legal relationship – *marriage* – that will protect and benefit the children so procreated. Finally, it is (or should be) obvious that, on both principled and practical grounds, the State could not inquire into an opposite-sex couple's willingness or ability to procreate before issuing a marriage license. *See Standhardt v. Superior Court*, 77 P.3d 451, 462 (Ariz. Ct. App. 2003) (explaining why such an inquiry would be constitutionally barred and impossible to administer).

progress").[6]

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[6] Notwithstanding petitioners' reading of the case, *see* Ky. Pet. Br. 47, Mich. Pet. Br. 63, Ohio Pet. Br. 56, the Court's decision in *Turner v. Safley* does not undercut the contention that the right to marry is tied to its procreative potential. At issue in *Turner* was a state prison regulation that prohibited inmates from marrying, absent a compelling reason for allowing their marriage (generally understood to be limited to "a pregnancy or the birth of an illegitimate child," *Turner*, 482 U.S. at 82). In holding that the right to marry applies to prison inmates, *id.* at 95, the Court acknowledged that "[t]he right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration," but determined that "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life." *Id.* The Court noted that "most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated." *Id.* at 96. The Court also observed that marriage often serves as a precondition to certain tangible and intangible benefits, including the "legitimation of children born out of wedlock." *Id.* Admittedly, the reasons given in support of recognizing the right of inmates to marry were not linked in express terms to procreation. And some of the reasons given, "expressions of emotional support and public commitment," "an exercise of religious faith as well as an expression of personal dedication," *id.* at 95-96, were wholly independent of procreation. That said, "it is clear that the Court was contemplating marriage between a man and woman when it declared unconstitutional the [prison] regulation." *Conaway v. Deane*, 932 A.2d at 621. "The case involved challenges by opposite sex couples, and a number, although not all, of the reasons given in support of the right to marry applied only to opposite-sex couples, i.e., consummation of the marriage and legitimization of children born outside the marital relationship." *Id.* Significantly, in *Turner*, the Court distinguished its summary affirmance in *Butler v. Wilson*, 415 U.S. 953 (1974), upholding a prohibition on marriage for inmates sentenced to life imprisonment. *Turner*, 482 U.S. at 96. In the absence of a pardon or a commutation, inmates serving a life sentence would not be able to consummate a marriage or procreate children. Petitioners do not cite or attempt to distinguish *Butler*.

This Court has never stated or even implied that the federal right to marry extends to same-sex couples. Until the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Dep't of Public Health* in 2003, no State allowed or recognized same-sex marriages. And, in the absence of a court order, *no* State allowed same-sex marriage until 2009, only six years ago. While eleven States have freely chosen to allow same-sex marriage,[7] more than three times as many States have approved state constitutional amendments (thirty States) or have enacted statutory equivalents (four States) codifying the common law and statutory reservation of marriage to opposite-sex couples. Given that same-sex marriage has been allowed only since 2003 (and then only in one State), it cannot be said that same-sex marriage is "deeply rooted" in "the Nation's history, legal traditions, and practices." There is no "long history" of a right to enter into a same-sex marriage and "[t]he mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it." *Osborne*, 557 U.S. at 72 (citation and internal quotation marks omitted).

Petitioners make no attempt to demonstrate that a right to same-sex marriage is "deeply rooted" in our "Nation's history, legal traditions, and practices." But, in their view, that is the wrong question to ask. Rather, the only question is whether there is a fundamental right to marry the person of one's choice and, if so, then same-sex couples are entitled to exercise that right in the same

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[7] Two (New Hampshire, Vermont) in 2009, one (New York) in 2011 and eight (Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, Rhode Island and Washington) at various times since November 2012.

manner as opposite-sex couples. *See* Ky. Pet. Br. 18-23, Mich. Pet. Br. 56-62, Tenn. Pet. Br. 18-21.[8] They note that this Court did not ask, in *Loving*, whether there was a right to "interracial marriage" or, in *Turner*, whether there was a right to "inmate marriage." Mich. Pet. Br. 60-61.

Petitioners, however, confuse a *restriction* on the exercise of a fundamental right with the *nature* of the right itself. *See* Op. 29 ("*Loving* addressed . . . an unconstitutional eligibility requirement for marriage; it did not create a new definition of marriage"). Interracial marriages were legal at common law, in many of the original thirteen colonies and in a number of other States that never banned them.[9] In short, there was no uniform tradition of prohibiting such marriages. Moreover, to the extent that there was a (non-uniform) "tradition" banning interracial marriages, any such "tradition" "was contradicted by a *text*–an Equal Protection Clause that explicitly establishes racial equality as a constitutional value." *Planned Parenthood v. Casey*, 505 U.S. 833, 980 n. 1 (Scalia, J., concurring in the judgment in part and dissenting in part). There is no comparable text that

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[8] Petitioners quote this Court's due process holding in *Loving* out of context. The Court did not characterize the right at issue as "the freedom of choice to marry," *simpliciter*, Tenn. Pet. Br. 17, but as "the freedom of choice to marry *not* . . . *restricted by invidious racial discriminations*." *Loving*, 388 U.S. at 12 (emphasis added).

[9] *See* Irving G. Tragen, *Statutory Prohibitions against Interracial Marriage*, 32 Cal. L. Rev. 269, 269-70 & n. 2 (1944) (common law); David H. Fowler, Northern Attitudes Towards Interracial Marriage 62-63 (1987) (colonies); Lynn Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 How. L.J. 117, 180-81 (2007) (other States).

establishes sexual orientation equality as a constitutional value from which one could derive a subsidiary right to enter into a same-sex marriage. In *Turner*, the Court noted that before adoption of the prison regulation challenged therein no regulation specifically authorized correctional officers to prohibit inmates from getting married and prison authorities had routinely allowed male inmates to marry and female inmates to marry civilians who were not ex-felons. 482 U.S. at 82, 98-99.[10]

Unlike the facts in *Loving*, *Zablocki* and *Turner*, until very recently (and then only in a minority of jurisdictions) marriage has always and everywhere been understood as a relationship that may exist only between a man and woman. *See Windsor*, 133 S.Ct. at 2715 (Alito, J., dissenting) (noting that "no State permitted same-sex marriage" until the Massachusetts Supreme Judicial Court's decided *Goodridge* in 2003, and "[n]o country allowed same-sex couples to marry until the Netherlands did so in 2000") (citation omitted). Regardless of the changes to marriage laws over the years, the fundamental right to marry *never* has been understood historically to include the right to marry someone of the same sex, to marry someone who was already married and whose marriage had not been dissolved by a decree of divorce or

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[10] Petitioners' representation that "prisoners had traditionally not been allowed to marry," Mich. Pet. Br. 61, is not supported by the only source cited, which merely noted the "broad discretion" prison authorities had "to permit or deny prisoner marriage." Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U.L. Rev. 275, 277 (1985). With respect to *Zablocki*, petitioners do not even allege that there was ever a widespread tradition of prohibiting persons who had outstanding child support obligations from marrying.

annulment (bigamy or polygamy), to marry someone who was incompetent or lacked the mental ability to enter into a marriage (contractual capacity), to marry an underage minor without parental consent and/or judicial authorization (nonage) or to marry a close relative (incest). *See Conaway v. Deane*, 932 A.2d at 622-23 (summarizing historically recognized limitations on marriage).[11]

Under current constitutional doctrine, the prohibition of bigamous (or polygamous) marriages, the prohibition of incestuous marriages, the prohibition of marriages of minors and the prohibition of marriages of persons lacking contractual capacity would all be reviewed (or have been reviewed) under the rational basis standard.[12] Rational basis review would apply (or was

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[11] Although States have sometimes differed in determining the outer limits of consanguinity that would bar two persons from marrying (*e.g.*, first cousins), they have always and everywhere prohibited and denied recognition to marriages between siblings and between ancestors and descendants. Almost two hundred years ago, Chancellor Kent noted that, "independent of any church canon, or of any statut[ory] prohibition," marriages in the "direct lineal line of consanguinity," as well as marriages between brothers and sisters, are unlawful and void "by the law of nature." *Wightman v. Wightman*, 4 Johns. Ch. 343, 348-49 (1820).

[12] *See, e.g., Bronson v. Swensen*, 395 F.Supp.2d 1329, 1332-34 (D. Utah. 2005) (rejecting challenge to state laws prohibiting bigamy and polygamy and holding that nothing in *Lawrence v. Texas* requires the State of Utah "to sanction . . . polygamous marriage"), *aff'd in part and vacated in part and remanded with directions*, 500 F.3d 1099 (10th Cir. 2007); *State v. Holm*, 2006 UT 31, 137 P.3d 726, 742-45 (defendant had no fundamental due process liberty interest to engage in polygamy by marrying his wife's sixteen-year-old sister) (also holding *Lawrence* inapplicable); *Potter v. Murray City*, 760 F.2d 1065, 1070-71 (10th Cir. 1985) (termination of officer from police force for

applied) precisely because neither the fundamental due process liberty interest in marriage nor any protected privacy interest is implicated. Indeed, in *Zablocki*, several Justices noted the States' authority to prohibit polygamous marriages, incestuous marriages and/or underage marriages. *See Zablocki*, 434 U.S. at 392 (Stewart, J., concurring in the judgment) ("[s]urely . . . a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, . . . or that no one can marry who has a living husband or wife"); *id.* at 399 (Powell, J., concurring in the judgment) ("[s]tate regulation [of marriage] has included bans on incest, bigamy, and homosexuality"); *id.* at 404 (Stevens, J., concurring in the judgment) ("laws prohibiting marriage to a child [or] a close relative . . . are unchallenged here even though they 'interfere directly and substantially with the right to marry'") (quoting majority opinion, *id.* at 387).

In divorcing the right to marry from its historical

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engaging in "plural marriage" did not violate his right to privacy, finding "no authority for extending the right of privacy so far that it would protect polygamous marriages"); *State v. Allen M.*, 571 N.W.2d 872, 877 (Wis. Ct. App. 1997) (State may "legitimately bar [siblings] from marriage") (dictum in case terminating parental rights over incestuously conceived children); *Muth v. Frank*, 412 F. 3d 808, 817 (7th Cir. 2005) (affirming denial of habeas corpus relief to criminal defendant who was convicted of incest for marrying his sister) (rejecting application of *Lawrence*); *Moe v. Dinkins*, 533 F.Supp. 623, 627-31 (S.D.N.Y. 1981) (rejecting a class action challenging the constitutionality of a state statute prohibiting the marriage of minors between the ages of 14 and 18 absent parental consent and holding that none of this Court's marriage or privacy cases – including *Skinner*, *Loving*, *Zablocki*, *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973), and *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) – required a heightened standard of review), *aff'd*, 669 F.2d 67 (2d Cir. 1982) (*per curiam*).

roots, petitioners formulate an abstract "right to marry the person of one's choice," Mich. Pet. Br. 1, that, as the court of appeals observed,[13] would subject *any* traditional limitation on the right to marry to the strict scrutiny standard of review. *See* Mich. Pet. Br. 57, Tenn. Pet. Br. 17-21. Presumably, statutes regulating the age at which a person may marry could be justified by the State's compelling interest in protecting children against abuse and coercion,[14] and statutes not allowing a person who lacks contractual capacity to marry could be justified by similar considerations. But could prohibitions of bigamous, polygamous and incestuous marriages (between related adults) withstand strict scrutiny review? Having abandoned the historical meaning of marriage and the

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[13] "The upshot of fundamental-rights status . . . is strict scrutiny-status, subjecting all state eligibility rules for marriage to rigorous, usually unforgiving, review." Op. 30. *See also Robicheaux v. Caldwell*, 2 F.Supp.3d 910, 926 (E.D. La. 2014) (strict scrutiny analysis would apply to prohibitions of polygamous marriages, incestuous marriages, marriages of transgendered persons and marriages of minors) (rejecting challenge to Louisiana laws reserving marriage to opposite-sex couples), *appeal pending*, No. 14-31037 (5th Cir.); *Bostic v. Schaefer*, 760 F.3d 352, 392-93 (4th Cir. 2014) (Niemeyer, J., dissenting) ("because laws prohibiting polygamous or incestuous marriages restrict individuals' right to choose whom they would like to marry, they would, under the plaintiffs' approach, have to be examined under strict scrutiny"); *Conaway v. Deane*, 932 A.2d at 623 (same with respect to marriages between closely related adults).

[14] Yet, under the strict scrutiny standard of review, would not the requirement that such statutes be "narrowly tailored" to promote such an interest necessarily have to allow for "as-applied" challenges to be brought by mature minors questioning the generalizations regarding age and maturity underlying the statute? *See Moe v. Dinkins*, 533 F.Supp. at 630 (rejecting, on rational basis review, plaintiffs' contention that the minimum age statute "denied them the opportunity to make an individualized showing of maturity").

limitations that have always and everywhere been placed on the right to marry, petitioners, as the court of appeals noted (Op. 22-23, 30-31), are unable to offer any principled rationale for limiting marriage to one spouse or to non-relatives.[15] Nor is there such a rationale, as multiple courts and judges have recognized.[16]

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[15] In an effort to avoid the obvious implications of their own argument, certain petitioners attempt to distinguish polygamous marriages from same-sex marriages on the basis that the present cases involve only "consenting adult *couples*," Ky. Pet. Br. 23 n. 4 (emphasis added), but surely that is a distinction without a difference. Why, if all the parties are consenting adults, should the number of adults affect their right to marry under petitioners' theory of marriage? Nor does their purported "distinction" explain the basis for barring incestuous marriages between closely related adults. In both cases – polygamous marriages and incestuous marriages – the prohibition would "directly and substantially" interfere with the right to marry, *id.*, which would not be permissible under petitioners' formulation of the right to marry.

[16] *See Conde-Vidal v. Garcia-Padilla*, Civil No. 14-1253 (PG), (D. P.R.), Opinion and Order, Oct. 21, 2014, 20 (under the "legal structure" some courts have "constructed" for "this new form of marriage [referring to same-sex marriage] are laws barring polygamy, or, say the marriage of fathers and daughters, now of doubtful validity? . . . . It would seem so, if we follow the plaintiffs' logic, that the fundamental right to marriage is based on 'the constitutional liberty to select the partner of one's choice'") (rejecting challenge to Puerto Rico's reservation of marriage to opposite-sex couples), *appeal pending*, No. 14-2184 (1st Cir.). *See also Lewis v. Harris*, 875 A.2d 259, 270 (N.J. Super. Ct. App. Div. 2005) (same with respect to polygamy), *aff'd in part and modified in part*, 908 A.2d 196 (N.J. 2006); *Morrison v. Sadler*, Cause No. 49D13-0211-PL-00197, Order on Motion to Dismiss 13 (May 7, 2003) (noting that plaintiffs "have not posited a principled theory of marriage that would include members of the same sex but still limit marriage to couples"), *aff'd* 821 N.E.2d 15 (Ind. Ct. App. 2005); *Goodridge*, 798 N.E.2d at 984 n. 2 (Cordy, J., dissenting) (same); *Kitchen v. Herbert*, 755 F.3d 1193, 1234 (10th Cir. 2014)

"When a federal court is obliged to confront a constitutional struggle over what is marriage, a singularly pivotal issue, the consequence of outcomes, intended or otherwise, seems an equally compelling part of the equation" which it would be "unjust to ignore." *Robicheaux*, 2 F.Supp.3d at 926. In the oral argument in *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013), Justice Sotomayor asked respondents' counsel, under his formulation of the right to marry (the same as the one petitioners advance), "what State restrictions could ever exist? Meaning, what State restrictions with respect to the number of people, with respect to . . . the incest laws, the mother and child, assuming that they are [of] age . . . , but what's left?" Tr. 46-47 (March 26, 2013). Counsel could not provide plausible answers to these questions. And neither have petitioners or any of the courts that have mandated same-sex marriage.

The amendments and statutes challenged in these cases do not implicate the fundamental right to marry. Accordingly, they are subject to rational basis review. For the reasons set forth in the briefs of the respondents, the laws are reasonably related to multiple, legitimate state interests, including promoting responsible procreation and

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(Kelly, J., concurring in part and dissenting in part) (plaintiffs' formulation of right at issue could not be limited to same-sex marriages). As the district court noted in *Robicheaux v. Caldwell*, under the same theory of marriage petitioners urge upon this Court, "inconvenient questions persist. For example, must the [S]tates permit or recognize a marriage between an aunt and niece? Aunt and nephew? Brother/brother? Father and child? May minors marry? Must marriage be limited to only two people? What about a transgender spouse? Is such a union same-gender or male-female? All such unions would undeniably be equally committed to love and caring for one another, just like the plaintiffs." 2 F.Supp.3d at 926.

channeling such procreation into stable family relationships where the children so procreated will be raised by their biological mothers and fathers.

II.

THE RESERVATION OF MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT DISCRIMINATE ON THE BASIS OF SEX IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

Petitioners contend that the challenged amendments and statutes discriminate on the basis of sex in violation of the Equal Protection Clause. Ky. Pet. Br. 38-39, Ohio Pet. Br. 48-49, Tenn. Pet. Br. 34-39.[17] In applying rational basis review, Op. at 19-24, the court of appeals implicitly rejected this contention. The classification in the law is not between men and women, as individuals, but between opposite-sex couples and same-sex couples of either sex.

The fundamental flaw with petitioners' argument is that "the marriage laws are facially neutral; they do not single out men or women as a class for disparate

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[17] The challenged laws are intended to channel potentially procreative opposite-sex sexual activity into a stable legal and social institution – ***marriage*** – in which the children so procreated may be raised by their biological mothers and fathers. The sexual activity of same-sex couples can ***never*** result in procreation. Thus, the distinction in the law is based on "biological reality," Op. 21, not, as petitioners argue, "gender-based" "stereotypes regarding the respective roles of women and men in relationships and marriage . . ." Tenn. Pet. Br. 36.

treatment, but rather prohibit men and women equally from marrying a person of the same sex." *Baker v. State*, 744 A.2d 864, 880 n. 13 (Vt. 1999). "[T]here is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct." *Id.* Other state courts have also rejected the claim that "defining marriage as the union of one man and one woman discriminates on the basis of sex."[18]

In the last nine years, the Alabama Supreme Court, the California Supreme Court, the Maryland Court of Appeals, the New Mexico Supreme Court, the New York Court of Appeals and the Washington Supreme Court have all held that laws reserving marriage to opposite-sex couples do not discriminate on the basis of sex. *Ex parte State of Alabama ex rel. Alabama Policy Institute*, No. 1140460, Alabama Supreme Court, Op. 85-87, March 3, 2015, *In re Marriage Cases*, 183 P.3d 384, 436-40 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571, 585-602 (Md. 2007); *Griego v. Oliver*, 316 P.3d 865, 979-80 (N.M. 2013); *Hernandez v. Robles*, 855 N.E.2d 1, 10-11 (N.Y. 2006) (plurality); *id.* at 20 (Graffeo, J., concurring); *Andersen v. King County*, 138 P.3d 963, 988 (Wash. 2006) (plurality); *id.* at 1010 (J.M. Johnson, J., concurring in judgment only). And the majority of federal district courts to have

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[18] *Id.* (citing *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 910 (1972), and *Singer v Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974)). *See also Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (same); *Dean v. District of Columbia*, 653 A.2d 307, 363 n. 2 (D.C. App. 1995) (Op. of Steadman, J.) (same).

considered the issue are in accord with these decisions.[19]

In sum, fifteen state reviewing courts,[20] seven

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[19] *See Jackson v. Abercrombie*, 884 F.Supp.2d 1065, 1098-99 (D. Haw. 2012), *vacated and remanded with directions to dismiss on grounds of mootness*, 585 Fed. App'x 413 (9th Cir. 2014); *Latta v. Otter*, 19 F.Supp.3d 1054, 1073-74 (D. Idaho 2014), *aff'd*, 771 F.3d 456 (9th Cir. 2014), *petitions for certiorari pending*, Nos. 14-765, 14-788; *Baskin v. Bogan*, 12 F.Supp.3d 1144, 1159-60 (S.D. Ind. 2014), *aff'd*, 766 F.3d 648 (7th Cir. 2014); *Robicheaux v. Caldwell*, 2 F.Supp.3d 910, 919 (E.D. La. 2014); *Sevcik v. Sandoval*, 911 F.Supp.2d 997, 1004-05 (D. Nev. 2012), *rev'd on other grounds*, 771F.3d 456 (9th Cir. 2014); *Bishop v. United States ex rel. Holder*, 962 F.Supp.2d 1252, 1286-87 (N.D. Okla. 2014), *aff'd sub nom. Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Geiger v. Kitzhaber*, 994 F.Supp.2d 1128, 1139-40 (D. Or. 2014); *but see Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 996 (N.D. Cal. 2010) (*contra*) (alternative holding), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded with instructions to dismiss appeal for lack of standing sub nom. Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013); *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1206 (D. Utah 2013) (same), *aff'd*, 755 F.3d 1193 (10th Cir. 2014); *Lawson v. Kelly*, Case No. 14-0622-CV-W-ODS (W.D. Mo.), Opinion and Order 15, Nov. 7, 2014 (same), *appeals pending*, Nos. 14-3779, 3780 (8th Cir.); *Jernigan v. Crane*, Case No. 4:13-cv-00410 KGB (E.D. Ark.), Opinion and Order 39-41, Nov. 25, 2014 (same), *appeal pending*, No. 15-1022 (8th Cir.); *Waters v. Ricketts*, Case No. 8:14CV536 (D. Neb.), Memorandum and Order 17, 26-28, March 2, 2015 (same) (preliminary injunction), *appeal pending*, No. 15-1452 (8th Cir.).

[20] In addition to the ten state decisions previously cited are the decision of the California Court of Appeal in *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 706 (Cal. Ct. App. 2006), *rev'd on other grounds*, 183 P.3d 384 (Cal. 2008), and four decisions of the New York Supreme Court, Appellate Division, later affirmed by the New York Court of Appeals: *Hernandez v. Robles*, 805 N.Y.S.2d 354, 370 (N.Y. App. Div. 2005) (Catterson, J., concurring), *Samuels v. New York State Dep't of Health*, 811 N.Y.S.2d 136, 143 (N.Y. App. Div. 2006), *In re Kane*, 808 N.Y.S.2d 566 (N.Y. App. Div. 2006), and *Seymour v. Holcomb*, 811 N.Y.S.2d 134 (N.Y. App. Div. 2006), *aff'd* 855 N.E.2d 1 (N.Y. 2006).

federal district courts and the District of Columbia Court of Appeals have all held that amendments and statutes reserving marriage to opposite-sex couples "do[] not subject men to different treatment from women; each is equally prohibited from the same conduct." *Goodridge v. Dep't of Public Health*, 798 N.E.2d at 991 (Cordy, J., dissenting) (Justice Cordy was addressing an *alternative* argument raised by the plaintiffs but not reached by the majority in their opinion invalidating the marriage statute). *But see Baehr v. Lewin*, 852 P.2d 44, 59-63 (Haw. 1993) (*contra*) (plurality); *Latta v. Otter*, 771 F.3d 456, 479-96 (9th Cir. 2014) (Berzon, J., concurring) (same-sex marriage prohibitions are unconstitutional gender-based classifications).

Relying upon *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down state anti-miscegenation statutes, petitioners argue that the mere fact that the challenged amendments and statutes have "equal application" to both men and women does not immunize them from the heightened burden of justification that the Equal Protection Clause requires of state laws drawn according to sex. Tenn. Pet. Br. 35. The analogy to *Loving* is unconvincing at several levels.

First, *Loving* dealt with race, not sex. The two characteristics are not fungible for purposes of constitutional analysis. For example, although it is clear that public high schools and colleges may ***not*** field sports teams segregated by ***race***, ***see*** *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir. 1968), they ***may*** field teams segregated by ***sex*** (at least where equal opportunities are afforded to males and females on separate teams) without violating the Equal

Protection Clause. *See Force by Force v. Pierce City R-VI School District*, 570 F.Supp. 1020, 1026 (W.D. Mo. 1983) (noting that "a number of courts have held that the establishment of separate male/female teams in a sport is a constitutionally permissible way of dealing with the problem of potential male athletic dominance"). Indeed, a school district may go so far as to provide identical sets of single-gender public schools without running afoul of the Equal Protection Clause. *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880, 885-88 (3d Cir. 1976), *aff'd mem. by an equally divided Court*, 430 U.S. 703 (1977). Although, since *Brown v. Board of Education*, 347 U.S. 483 (1954), classifications based on race have been subjected to strict scrutiny review without regard to whether a given classification happens to apply equally to members of different races, *see McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (striking down laws that criminalized interracial cohabitation), "the laws in which the Supreme Court has found sex-based classifications have all treated men and women differently." *Smelt v. County of Orange*, 374 F.Supp.2d 861, 876 (C.D. Cal. 2005), *aff'd in part, vacated in part and remanded with directions to dismiss for lack of standing*, 447 F.3d 673 (9th Cir. 2006).[21]

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[21] Citing *United States v. Virginia*, 518 U.S. 515, 519-20 (1996) (law prevented women from attending military college); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 719 (1982) (law excluded men from attending nursing school); *Craig v. Boren*, 429 U.S. 190, 191-92 (1976) (law allowed women to buy low-alcohol beer at a younger age than men); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (law imposed a higher burden on female servicewomen than on male servicemen to establish dependency of their spouses); *Reed v. Reed*, 404 U.S. 71, 73 (1971) (law created an automatic preference of men over women in the administration of estates).

Second, anti-miscegenation statutes were intended to keep persons of *different* races *separate*. Marriage statutes, on the other hand, are intended to bring persons of the *opposite* sex *together*. Statutes that mandated *segregation* of the *races* with respect to marriage cannot be compared in any relevant sense to statutes that promote *integration* of the *sexes* in marriage. *Hernandez v. Robles*, 805 N.Y.S.2d at 370-71 (Catterson, J., concurring).[22]

Third, unlike the history of the statutes struck down in *Loving*, which stigmatized blacks as inferior to whites, "there is *no* evidence that laws reserving marriage to opposite-sex couples were enacted with an intent to discriminate against either men or women. Accordingly, such laws cannot be equated in a facile manner with anti-miscegenation laws." *Hernandez*, 805 N.Y.S.2d at 370 (Catterson, J., concurring). As in *Goodridge*, there is no evidence that the challenged amendments and statutes were "motivated by sexism in general or a desire to disadvantage men or women in particular," 798 N.E.2d at 992 (Cordy, J., dissenting), as petitioners tacitly admit, *see* Ky. Pet. Br. 38, nor has either sex been subjected to "any harm, burden, disadvantage, or advantage," *id.*, from their adoption, as petitioners also admit, *see* Ohio Pet. Br. 48.

The reservation of marriage to opposite-sex couples does not discriminate on the basis of sex in

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[22] Thus, the comparison petitioners make between the marriage laws and a hypothetical law "providing that men may enter business partnerships only with other men and that women may enter into business partnerships only with other women," Tenn. Pet. Br. 36, is singularly inapt.

violation of the Equal Protection Clause.[23]

III.

THE RESERVATION OF MARRIAGE TO OPPOSITE-SEX COUPLES DOES NOT DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

Petitioners contend that the challenged amendments and statutes discriminate on the basis of sexual orientation in violation of the Equal Protection Clause. Ky. Pet. Br. 32-38, Mich. Pet. Br. 50-53, Ohio Pet. Br. 38-58, Tenn. Pet. Br. 39-45. The court of appeals rejected this contention, Op. 31-35, and properly so.

It is unnecessary to determine whether classifications based upon a person's sexual orientation should be subject to the strict or intermediate scrutiny that applies to suspect (race, national origin or alienage) or quasi-suspect classifications (sex or illegitimacy) because the challenged laws do not discriminate on the basis of sexual orientation. Conspicuous by its absence from any of the petitioners' briefs is any analysis as to whether the challenged amendments and statutes discriminate *on their face* between heterosexuals and homosexuals and, if not, whether they may be challenged on equal protection grounds.

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[23] In the debate over the proposed federal Equal Rights Amendment, the principal Senate sponsor acknowledged that the amendment would *not* affect the authority of the States to prohibit same-sex marriages so long as the prohibition applied to both men and women. 118 Cong. Rec. 9331 (1972) (statement of Senator Bayh).

The classification in the laws is not between heterosexuals and homosexuals, but between opposite-sex couples and same-sex couples of either sex. As multiple courts have recognized, "Parties to 'a union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals." *Baehr v. Lewin*, 852 P.2d 44, 51 n. 11 (Haw. 1993) (plurality). *See also Dean v. District of Columbia*, 653 A.2d 307, 362 n. 1 (D.C. App. 1995) (following *Baehr*) ("just as not all opposite-sex marriages are between heterosexuals, not all same-sex marriages would necessarily be between homosexuals"); *Goodridge v. Dep't of Health*, 798 N.E.2d 94, 953 n. 11 (Mass. 2003) (same); *Smelt v. County of Orange*, 374 F.Supp.2d 861, 874 (C.D. Cal. 2005) (same); *Sevcik v. Sandoval*, 911 F.Supp.2d 996, 1004 (D. Nev. 2012) ("[a]lthough the distinction the State has drawn . . . largely burdens homosexuals, the distinction is not by its own terms drawn according to sexual orientation").[24] *But see*

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[24] Several judges in other cases have made the same observation. *See, e.g., Baker v. State*, 744 A.2d 864, 890 (Vt. 1999) (Dooley, J., concurring) ("[t]he marriage statutes do not facially discriminate on the basis of sexual orientation"), *id.* at 905 (Johnson, J., concurring in part and dissenting in part) ("sexual orientation does not appear as a qualification for marriage under the marriage statutes" and the State "makes no inquiry into the sexual practices or identities of a couple seeking a license"); *Hernandez v. Robles*, 855 N.E.2d 1, 20 (N.Y. 2006) (Graffeo, J., concurring) (same); *Andersen v. King County*, 138 P.3d 963, 991, 996-97 (Wash. 2006) (J.M. Johnson, J., concurring in judgment only) (noting that the state DOMA "does not distinguish between persons of heterosexual orientation and homosexual orientation," and identifying a case in which a man and a woman, both identified as "gay," entered into a valid opposite-sex marriage) (citing *In re Parentage of L.B.*, 89 P.3d 271, 273 (Wash. Ct. App. 2004), *aff'd in part, rev'd in part on other grounds*, 122 P.3d 161 (Wash. 2005)).

Baskin v. Bogan, 766 F.3d 648, 657 (7th Cir. 2014) (*contra*); *Latta v. Otter*, 771 F.3d 456, 467-68 (9th Cir. 2014) (same); *Kerrigan v. Comm'r of Public Health*, 957 A.2d 407, 431 n. 24 (Conn. 2008) (same in case decided on state constitutional grounds); *Varnum v. Brien*, 763 N.W.2d 862, 884-85 (Iowa 2009) (same); *Griego v. Oliver*, 316 P.3d 865, 881 (N.M. 2013) (same) (by implication); *In re Marriage Cases*, 183 P.3d 384, 440-41 (Cal. 2008) (same).

In *Perry v. Schwarzenegger*, the district court found that "Some gay men and lesbians have married members of the opposite sex . . . ." 704 F.Supp.2d 921, 970 (N.D. Cal. 2010). That laws reserving marriage to opposite-sex couples do *not* discriminate on their face between heterosexuals and homosexuals is borne out by the remarkable (but heretofore unnoticed) fact that *dozens* of the plaintiffs in the same-sex marriage cases that have been brought over the last twenty-four years previously had been married to a person of the *opposite* sex.[25] In issuing marriage licenses, government officials do not inquire into the applicants' sexual orientation and, even if the applicants volunteered that they were homosexual, the license would still issue if they were of the opposite sex. Conversely, no license would be issued to two heterosexuals of the same sex. *See* Andrew Koppelman, *Response: Sexual Disorientation*, 100 Geo. L.J. 1083, 1087 (2012) (laws reserving marriage to opposite-sex couples do not discriminate on the basis of sexual orientation).

Admittedly, the challenged amendments and statutes have a greater *impact* on homosexuals who, if

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[25] *See* Appendix (listing cases and plaintiffs).

they wish to marry, presumably would want to marry someone of the same sex, than on heterosexuals who would want to marry someone of the opposite sex.[26] Nevertheless, disparate impact alone is insufficient to invalidate a classification, even with respect to suspect or quasi-suspect classes such as race and sex. Under well-established federal equal protection doctrine, a facially neutral law (or other official act) may not be challenged on the basis that it has a disparate impact on a particular race or sex unless that impact can be traced back to a discriminatory purpose or intent. The challenger must show that the law was enacted (or the act taken) *because of*, not *in spite of*, its foreseeable disparate impact. *See Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (race); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-71 (1977) (race); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271-80 (1979) (sex).

Petitioners have cited no competent evidence that supports the conclusion that in adopting the challenged amendments, the People of Kentucky, Michigan, Ohio and Tennessee had the ***intent*** or ***purpose*** to discriminate against homosexuals who wish to marry someone of the same sex,[27] as opposed to the mere ***knowledge*** that the

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[26] *See Latta*, 771 F.3d at 482 n. 5 (Berzon, J., concurring) ("[w]hile the same-sex marriage prohibitions obviously operate to the disadvantage of the people likely to wish to marry someone of the same gender – i.e. lesbians, gay men, bisexuals, and otherwise-identified persons with same-sex attraction–the individuals' *actual* orientation is irrelevant to the application of the laws").

[27] Petitioners tacitly admit that the marriage laws were *not* enacted and approved on the basis of "[a]nimosity – that is, outright

proposed amendments, codifying the traditional understanding of marriage, could have a disparate impact on them (nor do they explain how one would go about determining the subjective motivations of millions of voters in four States).[28] Moreover, as the court of appeals noted, Op. 24, the challenged amendments merely "codified a long-existing, widely held social normal already reflected in state law." Petitioners have made no argument that either the common law definition of marriage as a relationship that may exist only between a man and a woman or the longstanding statutory codifications of that rule "were motivated by ill will." *Id.* at 28.

The reservation of marriage to opposite-sex couples does not discriminate on the basis of sexual orientation in violation of the Equal Protection Clause.

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hostility or bigotry" toward homosexuals. Ky. Pet. Br. 30. *See also* Ohio Pet. Br. 24 (same), Mich. Pet. Br. 45-46 (no need to consider whether laws "were motivated by an impermissible purpose"). And for the reasons articulated by the court of appeals, *see* Op. 24-28, and by Judge Holmes in his concurring opinion in *Bishop v. Smith*, 760 F.3d 1070, 1096-1109 (10th Cir. 2014) (Holmes, J., concurring), neither *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), nor *Lawrence* nor *Romer v. Evans*, 517 U.S. 620 (1996), provides a basis for *inferring* such a purpose, either.

[28] *See* Op. 26 ("[i]f assessing the motives of multimember legislatures is difficult, assessing the motives of *all* voters in a statewide initiative strains judicial competence") (noting that almost ten million people voted for the four state constitutional amendments).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Appendix

Partial List Of Same-Sex Marriage Cases In Which One Or More Of The Plaintiffs Acknowledged That They Had Previously Been Married To A Person Of The Opposite Sex*

Alaska, Kansas

Brief of Ninety-Two Plaintiffs in Marriage Cases in Alabama, Alaska, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota and Texas as *Amici Curiae* in Support of Petitioners, Nos. 14-556, 15-562, 15-571 and 14-574, Appendix 3a (Tracey Wiese), 9a (Carrie Fowler)

California

Perry v. Schwarzenegger, 704 F.Supp.2d 921, 972 (N.D. Cal. 2010), Findings of Fact, No. 54(I) (Sandra Stier)

Florida

Pareto v. Ruvin, Case No. 14-1661 CA 24, Circuit Court, Eleventh Judicial Circuit (Miami-Dade County), Florida, Complaint for Declaratory and Injunctive Relief (Jan. 21, 2014), ¶ 22, p. 9 (Pamela Faerber)

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* It should be noted that this list does *not* include the names of many other plaintiffs who alleged in their complaints or declarations that they had had children by a "prior relationship" without expressly stating whether that "relationship" had been formalized in a marriage.

Illinois

Darby v. Orr, Case No. 12 CH 19718, Circuit Court, Cook County, Illinois, Complaint for Declaratory Judgment and Injunctive Relief (May 30, 2012), ¶ 35, p. 10 (Lynn Sprout), ¶ 70, p. 19 (Suzanna Hutton)

Lazaro v. Orr, Case No. 12 CH 19719, Circuit Court, Cook County, Illinois, Complaint for Declaratory Judgment and Injunctive Relief (May 30, 2012), ¶ 6, p. 6 (Bert Morton), ¶ 8, p. 7 (Daphne Scott-Henderson, ¶ 12, p. 10 (Patricia Garcia)

Indiana

Baskin v. Bogan, 12 F.Supp.3d 1144 (S.D. Ind. 2014), First Amended Complaint for Declaratory and Injunctive Relief (March 31, 2014), ¶ 17, p. 7 (Bonnie Everly, Linda Judkins); Decl. of Dawn Lynn Carter, ¶ 6, p. 2

Iowa

Varnum v. Brien, Case No. CV 5965, District Court, Polk County, Iowa, Amended Petition for Declaratory Judgment and Supplemental Injunctive and Mandamus Relief (Aug. 30, 2006), ¶ 8, p. 6 (Larry Hoch)

Maryland

Conaway v. Deane, Case No. 24-C-04-005390, Circuit Court, Baltimore City, Maryland, Complaint for Declaratory and Injunctive Relief (July 7, 2004), ¶ 114, p. 26 (Lisa Kebreau)

Massachusetts

Goodridge v. Dep't of Public Health, Civil Action No. 2001-1647-A, Superior Court, Suffolk County, Massachusetts, Verified Complaint (April 11, 2001), ¶¶ 35, 36, p. 7 (David Wilson, Robert Compton)

Montana

Rolando v. Fox, 23 F.Supp.3d 1227 (D. Mont. 2014), Complaint for Declaratory and Injunctive Relief (May 21, 2014), ¶ 23, p. 9 (Angela Rolando, Tonya Rolando)

Nebraska

Waters v. Heineman, Case No. 8:14-cv-00356, United States District Court, District of Nebraska, Complaint (Nov. 17, 2014). ¶ 28, p. 7 (Carla Morris-Von Kampen)

South Dakota

Rosenbrahn v. Daugaard, Civ. No. 4:14-CV-04081-KES, United States District Court, District of South Dakota, Complaint for Permanent Injunction and Declaratory Relief (May 22, 2014), § 57, p. 16 (Lynn Serling-Swank), § 74, p. 21 (Barbara Wright, Ashley Wright)

West Virginia

McGee v. Cole, Civil Action No. 3:13-24068, United States District Court, Southern District of West Virginia (Oct. 1, 2014), ¶ 15, p. 6 (Justin Murdock)

Wisconsin

Wolf v. Walker, 26 F.Supp.3d 866 (W.D. Wis. 2014), Complaint for Declaratory and Injunctive Relief (Feb. 3, 2014) ¶ 49, p. 14 (Charvonne Kemp)